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IN THE

Supreme Court of the United States

[illegible]

No. 75

COUNTY OF SANTA BARBARA, a public corporation of the State of California; THE CITY OF SANTA BARBARA, a municipal corporation of the State of California; [illegible]

v.

ROBERT J. MALLERY, Los Angeles District Engineer, Corps of Engineers; WALTER J. HICKEL, Secretary of the Interior, [illegible]

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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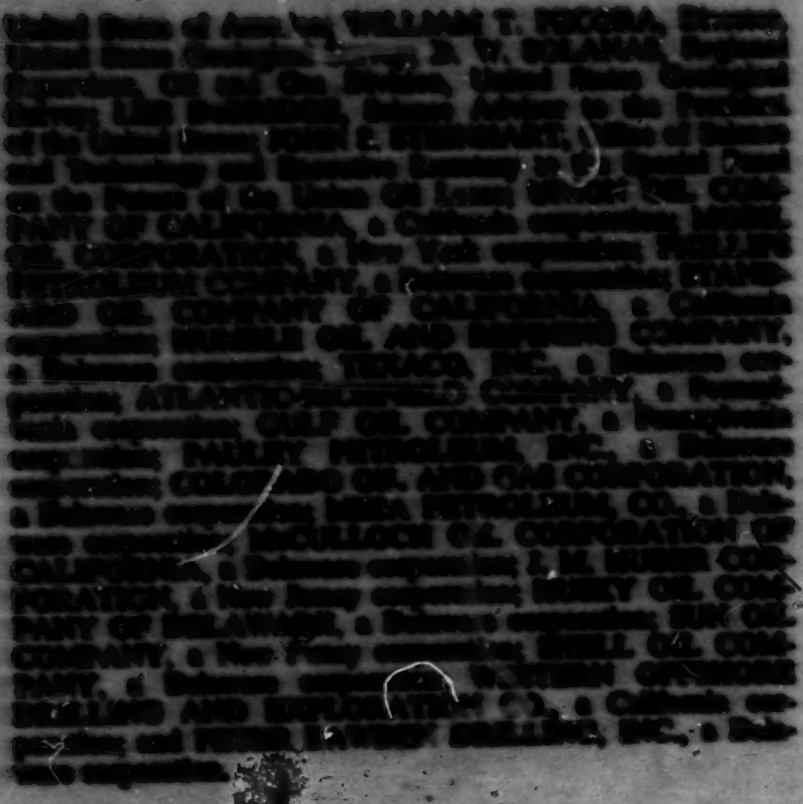

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IN THE

Supreme Court of the United States

October Term, 1970

No. .....

COUNTY OF SANTA BARBARA, a political subdivision of the State of California; THE CITY OF SANTA BARBARA, a municipal corporation of the State of California; ALVIN WEINGAND; JACK D. KISCH; REYNOLDS YATER; JINNIE HUGLIN; NORMAN SANDERS; MARGARET D. GREENWALD; ARTHUR DAYTON; LEWIS MOTTER SMITH; MRS. GEORGE SIDENBERG, JR.; MRS. KENNETH PECK; ROBERT O. EASTON; CHARLES M. CAMPBELL, JR.; KENNETH MILLAR; WILLIAM URE; JAMES BOTTOMS; FRED EISSLER; NORMAN S. NYCE; MRS. H. R. BENHAM, JR.,

Petitioners,

vs.

ROBERT J. MALLEY, Los Angeles District Engineer, Corps of Engineers; WALTER J. HICKEL, Secretary of the Interior, United States of America; WILLIAM T. PECORA, Director, United States Geological Survey; D. W. SOLANAS, Regional Supervisor, Oil and Gas Division, United States Geological Survey; LEE DuBRIDGE, Science Advisor to the President of the United States; JOHN S. STEINHART, Office of Science and Technology and Executive Secretary to the Special Panel on the Future of the Union Oil Lease; UNION OIL COMPANY OF CALIFORNIA, a California corporation; MOBIL OIL CORPORATION, a New York corporation; PHILLIPS PETROLEUM COMPANY, a Delaware corporation; STANDARD OIL COMPANY OF CALIFORNIA, a California corporation; HUMBLE OIL AND REFINING COMPANY, a Delaware corporation; TEXACO, INC., a Delaware corporation; ATLANTIC-RICHFIELD COMPANY, a Pennsylvania corporation; GULF OIL COMPANY, a Pennsylvania corporation; PAULEY PETROLEUM, INC., a Delaware corporation; COLORADO OIL AND GAS CORPORATION, a Delaware corporation; MESA PETROLEUM, CO., a Delaware corporation; McCULLOCH OIL CORPORATION OF CALIFORNIA, a Delaware corporation; J. M. HUBER CORPORATION, a New Jersey corporation; HUSKY OIL COMPANY OF DELAWARE, a Delaware corporation; SUN OIL COMPANY, a New Jersey corporation; SHELL OIL COMPANY, a Delaware corporation; WESTERN OFFSHORE DRILLING AND EXPLORATION CO., a California corporation; and PETER BAWDEN DRILLING, INC., a Delaware corporation.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners[1] pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit affirming judgments of the United States District Court, Central District of California, denying motions for preliminary injunctions. The preliminary injunctions, if granted would have, in the "Hickel" cases, restrained the defendants Secretary of the Interior and Director of the United States Geological Survey from allowing new exploration or development in the Santa Barbara Channel off the Coast of California following the oil well blowout of January, 1969, without holding a public hearing thereon accompanied by access to the plaintiffs and the public of the data upon which the defendants acted or intend to act in connection with and since said oil spill. As to the defendant Malley, the preliminary injunction if granted, would have restrained him, the District Engineer of the Corps of Engineers, from granting any permits with respect to new structures or obstructions without first according hearings.

Opinions Below.

There is no written opinion by the trial court. The opinion of the court below in the "Hickel" cases is reported at 426 F. 2d 164, and in the *Malley* case, at 426 F. 2d 171. Copies of these opinions are set out in the appendix hereto.

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[1]Pursuant to Rule 25(5) of this Court, this is a single petition for writ of certiorari in three cases (*County of Santa Barbara v. Malley*, No. 25049; *County of Santa Barbara v. Hickel*, No. 25413 and *Weingand v. Hickel*, No. 25414, in the Ninth Circuit Court of Appeals). The three cases all involve "identical or closely related questions", and were heard on the same record and at the same time by the lower court. In certifying the record to this Court (prior to the July 1, 1970 change in the Rules which obviated that requirement) the Clerk of the Court of Appeals did so as a single record in all three cases under a title similar to the one set out by petitioners here.

In the *Malley* case, because, upon the District Court's denial of the preliminary injunction, one of the defendant oil companies began moving a huge platform, "Hillhouse", from Vancouver, Washington to the Santa Barbara Channel for installation, petitioners sought relief in this Court pending appeal and also sought a Rule 20 writ of certiorari. Those applications were denied. No opinions were written. The action of this Court is reported at 396 U.S. 950. The subsequent appeal to the Court of Appeals and the present petition did not and does not involve the matters as to which the mentioned temporary relief had heretofore been sought in this Court. The appeal and this petition involve future action and do not seek to undo the past. At the time relief as to "Hillhouse" was sought in this Court, representations were made to this Court by the defendants that the case ought to be permitted to pursue its normal (although expedited) course on the merits through the Court of Appeals. That course has been pursued. This petition seeks review thereof.

Jurisdiction.

1. The date of the judgments sought to be reviewed and the time of their entry is April 21, 1970.

2. No rehearing was sought in the Court of Appeals. Extension of time within which to file this petition for writ of certiorari to and including September 18, 1970, was granted by Mr. Chief Justice Burger on July 22, 1970.

3. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. 1254(1).

Questions Presented for Review.

1. As to the *Malley* case: Under the circumstances extant in the Santa Barbara Channel following the oil well blowout of January, 1969, do the regulations of the Corps of Engineers require that a public hearing be held before the District Engineer issues a permit allowing new structures or obstructions in the Channel? If they do not, are plaintiffs entitled, as a matter of due process, to such a public hearing prior to the permit being issued?

2. As to the *Hickel* cases: Under the circumstances extant in the Santa Barbara Channel following the oil well blowout therein in January, 1969, constitutionally construed to accord due process and equal protection, do the regulations of the Department of the Interior require that a public hearing be held, with public access to the data upon which they have acted and intend to act, before the Secretary of the Interior or the Director of the United States Geological Survey make their decision as to further new and significant oil exploitation in the channel.[2]

3. Should costs on appeal be allowed in a suit brought on behalf of the public to protect the environ-

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[2]The wording of plaintiffs' motion for injunction *pendente lite* in the District Court lends itself to an interpretation that plaintiffs were seeking much broader relief. Petitioners tried to make it clear in the Court of Appeals, and they do so here, that they do not contend they are entitled to a hearing each time the oil companies are ordered to turn or not to turn, a screw. They do contend, however, that in the light of the major decisions the Secretary is required to make regarding the Channel in the aftermath of the blow-out, as to such, they are entitled to a hearing.

ment from pollution caused by commercial exploitation of the public's natural resources? Subsidiary to that question, if some costs are allowable, ought not the amount be reduced when the briefs are unnecessarily printed and unnecessarily include as printed appendices, the entire Outer Continental Shelf Lands Act, extensive Regulations, as well as Findings and Orders of the trial court and a sample lease, the latter two of which were in the duplicated record before the Court?

Constitutional Provision and Statute Involved.

The due process clause of the Fifth Amendment, 33 C.F.R. 209.120(g), pertinent portions of the Outer Continental Shelf Lands Act (67 Stat. 462; 43 U.S.C. 1331, *et seq.*) and of 30 C.F.R. Part 250 and 43 C.F.R. Part 3380, are set out in the Appendix.

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance.

The District Court had jurisdiction under Section 4 of the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U.S.C. 1333(b) and under 28 U.S.C. 1331 and 1361.

Facts.

In one of the *Hickel* cases (*County v. Hickel*, No. 25413 in the court below) the plaintiffs are the City and the County of Santa Barbara, the local governmental bodies on the Santa Barbara Channel on the coast of California whose property and that of the inhabitants therein, was affected by the 1969 oil spill. The defendants in that action are the Secretary of the

Interior, the Director of the United States Geological Survey, a part of the Department of the Interior responsible for the operations on the Outer Continental shelf, the regional supervisor of the Geological Survey, and most of the oil companies which have leases in the outer continental shelf in the Channel.

In the other *Hickel* case (*Weingand v. Hickel*, No. 25414 in the court below), the plaintiffs are private citizen property owners along the coast, boat owners, businessmen, and members of the public, all of whom were variously damaged by the oil spill. The plaintiffs also include officials of conservation organizations.[8] The defendants in the private citizen-members of the public case are the same governmental officers as in the *County v. Hickel* case, plus those persons who participated in the DuBridge Panel Report which recommended certain actions in the Channel following the blowout, and the four oil companies jointly interested in Platform "A", from which was drilled the well which blew out.

In the *Malley* case (*County v. Malley*, No. 25049 in the court below), the plaintiffs are all the plaintiffs in the two *Hickel* cases. The defendants are the District Engineer of the Corps of Engineers and all the oil companies which have leases in the Channel.

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[8]Plaintiff Mrs. George Sidenberg, Jr., is President of Get Oil Out! Inc. (GOO); plaintiff Alvin Weingand is the former president of GOO; plaintiff Fred Eissler is the President of Scenic Shoreline Preservation Conference, Inc.; plaintiff Norman Sanders is the President of Santa Barbara Citizens for Environmental Defense.

As indicated in the first paragraph of this petition, plaintiffs sought preliminary relief in the form of hearings and access to data before further exploitation of the Channel, following the blowout, went forward. From the denials, the appeals were taken and that aspect of the cases is here.

In the meantime however, a three-judge court having been appointed in the *Hickel* cases, there is pending before that court plaintiffs' later motions for preliminary injunction and defendants' motions to dismiss.[4] Although not pending before the three-judge court in *Malley* because no effort to enjoin the enforcement, operation or execution of a statute on the ground of repugnancy to the Constitution was made in that case, plaintiffs' motions in *Malley* for a preliminary injunction and defendants' motions to dismiss will, it now appears, be decided at the same time as the motions in *Hickel*, the single judge in *Malley* being one of the three judges in *Hickel*.

As is clear, plaintiffs have thus far been unsuccessful in their efforts to obtain a public hearing, and oil exploitation on the outer continental shelf in the Santa Barbara Channel is going forward with various permits being granted the oil companies by the public officials although some applications are presently pending.

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[4]The three-judge court denied plaintiffs' motions for summary judgment.

Plaintiffs sought to have the motions now pending before the District Court heard and disposed of in time so that any appeals to this Court (in *Hickel*) by either side could be filed at the same time as this petition. They have been unable to do so. The date for argument before the three-judge court has not yet been set and the defendants have obtained various extensions of time to file their documents. The latest word as to the time the three-judge court would set is that it might be some time this month.

Because of the pendency of related phases of these cases before the District Court, upon determination of which it is expected appeal will be taken to this Court by either side we have not here set out detailed facts and, as we shall explain in a moment, we request that this petition not be passed upon until the rest of the cases get to this Court.

Over the objections of plaintiffs, the court below awarded costs to the oil companies amounting to almost $4,500.00. As appears from Question 3, above, petitioners' objections are on the ground that in this kind of a case costs ought not be awarded at all, or if they are, that unnecessary printing costs should not be allowed.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

This Court has never decided whether there exists a right to a public hearing and whether that right is of constitutional dimension when at issue before an administrative agency is the public right to a decent environment—an environment free from unreasonable pollution. This petition for writ of certiorari brings that issue to this Court.

Although the Court of Appeals for the Ninth Circuit in these cases refused to view the public's right to a hearing as entitled to judicial protection, other courts of appeal, including that of the District of Columbia in a pioneer opinion (*Office of Communications*, etc., cited in the next paragraph) by (then) Judge Burger, hospitably viewed that right and held it worthy of protection by the courts.

The manifest importance of this Court determining whether in a large public issue such as this, a public hearing should be held, either as a matter of statutory construction, or because it is constitutionally required, cannot be gainsaid. (*Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F. 2d 608, 612, 620 [CA 2 1965], *cert. den.* 384 U.S. 941; *Office of Communications of United Church of Christ v. Federal Communications Commission*, 359 F. 2d 994, 1004 [CA DC 1966]; *Michigan Consolidated Gas Co. v. Federal Power Commission*, 283 F. 2d 204, 224 [CA DC 1960]; *D. C. Federation of Civic Associations v. Airis*, 391 F. 2d 478, 484 [CA DC 1968]; *Road Review League, Town of Bedford v. Boyd*, 270 F. Supp. 650 [SD NY 1967]; *Powelton Civic Home Owners Association v. Department of*

Housing & Urban Development, 284 F. Supp. 809 [ED Pa 1968]; see, also, *City of Chicago v. United States*, 396 U.S. 162 [1969]; *Morgan v. United States*, 304 U.S. 1, 14-15 [1938]; *Sniadach v. Family Finance Corporation*, 395 U.S. 337, 339 [1969]; *Thorpe v. Housing Authority of Durham*, 393 U.S. 337, 339 [1969]; *Silver v. N. Y. Stock Exchange*, 373 U.S. 341 [1963]; *Wong Yang Song v. McGrath*, 339 U.S. 33 [1950].)

1. The Malley Case.

In the *Malley* case, the court below erred in holding that properly construed under the circuumstances of this case, the current[5] regulations do not require a hearing. The regulations provide (33 C.F.R. 209.120 [g][1]) that "[i]t is the policy of the Chief of Engineers to conduct his civil works program in an atmosphere of public understanding, trust and mutual cooperation, and in a manner responsive to public needs and desires. To this end, public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action. In case of doubt a public hearing should be held." The regulations (33 C.F.R. 209.120[g][2]) also cite "general public opposition", "Congressional or responsible local authorities" requesting it, as among the instances warranting public hearings.

These conditions of the regulations were abundantly met here. Indeed, plaintiffs here are the local city and county themselves. Senatorial request was made and that there is general public opposition to the issuance of the permits is to put it mildly. Although the regula-

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[5]While the case was pending on appeal, the regulations of the Corps of Engineers were amended.

tions (33 C.F.R. 209.120[g] [3]) do restrict the hearings to matters of navigation and national security[6] the record is that plaintiffs were prepared to show by calling experts just such adverse effect, namely, that applications applied for were in areas straddling sea lanes, that the maneuverability of long vessels was such (taking two or more miles to respond to a change of course) that allowing drilling structures where contemplated would be hazardous; that the more drilling allowed in the Channel, the more danger and likelihood of leakage, leakage which can cause such contamination as to impair free navigation and cause expensive hull and engine damage, particularly to small pleasure craft, not to mention the fact that the January, 1969 spillage required the complete closing of the Santa Barbara Harbor.

Accordingly, plaintiffs are entitled to a hearing.

The rationale of the court below is found in the third from the last paragraph of its opinion. There the court reasoned that plaintiffs were not entitled to hearings because any such (1) would be concerned only with navigation and national security; (2) would pertain to the use of lands controlled by the United States under lease to others; (3) would not purport to adjudicate the property rights of any of the plaintiffs. None of these, we submit, is a valid reason for denying the right to be heard.

One. As pointed out above, plaintiffs did have important and expert factual objections having to do with navigation which the Corps of Engineers should have

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[6]Thus leaving out considerations of environment, a matter dealt with by the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4371, *et seq.*) and presently before the District Court in the motions now before that court.

heard and which the court below should have required it to hear.

Two. The cases cited by the Court of Appeals in support of its "use of lands controlled by the United States" argument[7] themselves recognize that Congress may provide for procedural protection in dealing with the public lands. This, Congress has done by the passage of the National Environmental Policy Act, *supra*.[8] Accordingly, those cases are not applicable to the facts of this case.

Three. That any hearings by the District Engineer would not adjudicate the property rights of any of the plaintiffs (on the premise that only defense and national security would be involved), is no ground for denying them the right to be heard. In so viewing the case, the court below has mistakenly disregarded the rights of the public in such matters and its right to be heard. *Cf.* (then) Judge Burger in *Office of Communications to United Church of Christ v. F.C.C., supra,* 359 F. 2d 994 (CA DC 1966) and the "environmental" cases cited hereinabove, page 9.

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[7] *Alabama v. Texas,* 347 U.S. 272, 273 (1954); *United States v. California,* 332 U.S. 19, 27 (1947); *United States v. San Francisco,* 310 U.S. 16, 29-30 (1940).

[8] The applicability and effect of that Act are matters now before the District Court. While this Court could pass on the present appeals in the light of the new and changed law since the case was presented to the District Court (*Douglas v. City of Jeannette,* 319 U.S. 157, 165 [1943]) *Ziffrin v. United States,* 318 U.S. 73, 78 [1943]; *Thorpe v. Housing Authority,* 393 U.S. 268, 281 [1969]), we suggest it would be more appropriate and efficient for this Court to consider the effect of the Environmental Policy Act after the three-judge District Court passes upon the question and thus this Court will have the benefit of that court's views. For this reason we are suggesting that this Court not pass upon this petition for writ of certiorari until after the District Court has had opportunity to consider the matter.

2. The Hickel Cases.

As to the *Hickel* cases, the court below erroneously ruled that the question of the Constitutional right to a hearing under the regulations was[9] for the three-judge court.[9] We contend that constitutionally and properly construed, the regulations provide for hearings and that the Court of Appeals erred in not passing on the question. The Court below cited no cases in support of its ruling that it had no jurisdiction. Frankly, we concede that the matter is not clear and that the decisions of this Court are not dispositive.

In the District Court we said that the three-judge court should pass upon the issue and hear the motions for injunction *pendente lite*, but the District Court ruled the other way and agreed with the Government and the oil companies that the single judge should hear the motions.[10] As to this issue, if the three-judge court now takes jurisdiction and determines the constitutionality of the regulations, vis-a-vis whether they do, or are required to, afford hearings, that ruling of that court, whichever way it goes, may well have a significant effect on this phase of this petition.

Whether hearings are constitutionally required is best determined by this Court after it has the views of the lower courts. These, this Court does not yet have. It

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[9]The Court below said (Appx. p. 17): "[A]ll aspects of this contitutional question (that the failure to grant plaintiffs a hearing and prior access to data deprives them of due process of law) have heretofore been assigned to the three-judge court. . . . and we are therefore without jurisdiction to consider that issue."

[10]On the motions for preliminary injunction now pending before the District Court the Government has receded and now agrees that it is proper for the three-judge court to consider the motions.

does not have the views of the Court of Appeals. That court expressly declined to pass on the issue. It should have the views of the three-judge court. True, at this point, no one knows what the three-judge court will do. When it acts, we will request leave of Court to file an appropriate supplemental petition herein.

3. Costs Should Not Have Been Awarded.

The awarding of costs is not mandatory (Rule 39 [a], F.R. App. Proc.). They should not have been allowed in the instant cases.

The parties aggrieved in a suit of this nature are the public. A large judgment of costs against citizens who thus undertake to protect the public welfare can have none but a chilling effect on efforts, as here, to seek to judicially protect the right to a decent environment. The citizen has difficulty enough combating the Government and the huge commercial interests whose conduct is involved. He ought not be saddled with such adversaries' costs.

It is true that among the plaintiffs in these cases are the City and the County of Santa Barbara and that such entities can "afford" to pay the costs here taxed. But here, again, these entities are acting as trustee to protect the public. To be required to pay heavy costs will, as to them likewise, put a damper on and discourage this worthwhile public effort.

In any event, the court below should have reduced the amount of costs awarded. The oil companies printed their briefs. They need not have. The Rules permit duplicated or other copying process briefs to be filed (Rule 28[g], F.R. App. Proc.). The Government here did not find it necessary to print, but

filed duplicated briefs[11] This is not to say that if the oil companies wanted to print their briefs, they should not be permitted to do so, but there is no warrant for requiring the plaintiffs to pay for that extra expense.

Moreover, the brief of some of the appellants printed as an appendix the entire Outer Continental Shelf Lands Act (23 pages) and some 50 pages of Regulations. This was unnecessary. The Rules (Rule 28[f] F. R. of App. Proc.) provide that such matter may be supplied the court in pamphlet form. Here, again, if the oil companies desired to print this lengthy material, they could do so, but the plaintiffs ought not be required to pay for this luxury when, as the Rules recognize, a less expensive method is available. Similarly unnecessarily printed as appendices were a sample lease and the findings and orders of the trial court (30 pages), all of which were readily available in the duplicated record which had been prepared for the court.

In the interests of the sound administration of justice, this Court ought to grant certiorari so as to lay down guidelines for the future in such matters.

Conclusion.

In its opinion, the Court below spoke of not wasting judicial resources and unnecessarily confusing issues. Petitioners agree and for this reason are urging that this Court not pass on this petition at this time.

Despite the seeming complexity of the proceedings, one significant theme has been and is urged by plaintiffs throughout: the desire for a *hearing* before the Government makes any significant decision affecting the future, oil-wise, of the Santa Barbara Channel. Up

[11]The Government also did not request costs.

to the present time, this theme has had as its central base the Constitution. Subsequent to the filing of the complaints in these actions, Congress adopted the National Environmental Policy Act of 1969 (83 Stat. 852; 42 U.S.C. 4331, *et seq.*). By virtue of that Act and authoritative executive and administrative interpretation of it, petitioners are entitled to a hearing with respect to future significant Governmental actions in the Channel.[12]

This Court will adjudicate the rights of the parties seeking relief as to the future in the light of legislation enacted after the launching of the litigation. (See cases cited, *supra*, fn. 8). But since the effect of that legislation is presently pending before the District Court, we submit it would be more appropriate for this Court to await the views of the District Court on that issue and then adjudicate the entire case.[13]

Accordingly, the petition for writ of certiorari should be granted after the District Court has had an opportunity to dispose of the motions before it and then

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[12]See Presidential Executive Order No. 11514, Sec. 2(b), (d); 35 F.R. 4247; and Interim Guidelines of the Council on Environmental Quality, § 13, 35 F.R. 7392.

[13]We would prefer to have filed in this Court as to all phases of the cases at the same time. We secured an extension of time to file this petition in an effort to do so. Our application for extension as it explained, was based on the hope that the motions then pending before the three-judge District Court would be disposed of so that appeals from the decisions therein could be before this Court along with this petition. Those decisions have not yet been made and so, because of the time limitations on the filing of a petition for writ of certiorari, we are compelled to file this petition now.

upon the filing of supplemental papers herein, with opportunity, of course, for respondents to reply; and we consent to an extension of time until then for respondents to file their reply to this instant petition.

Respectfully submitted,

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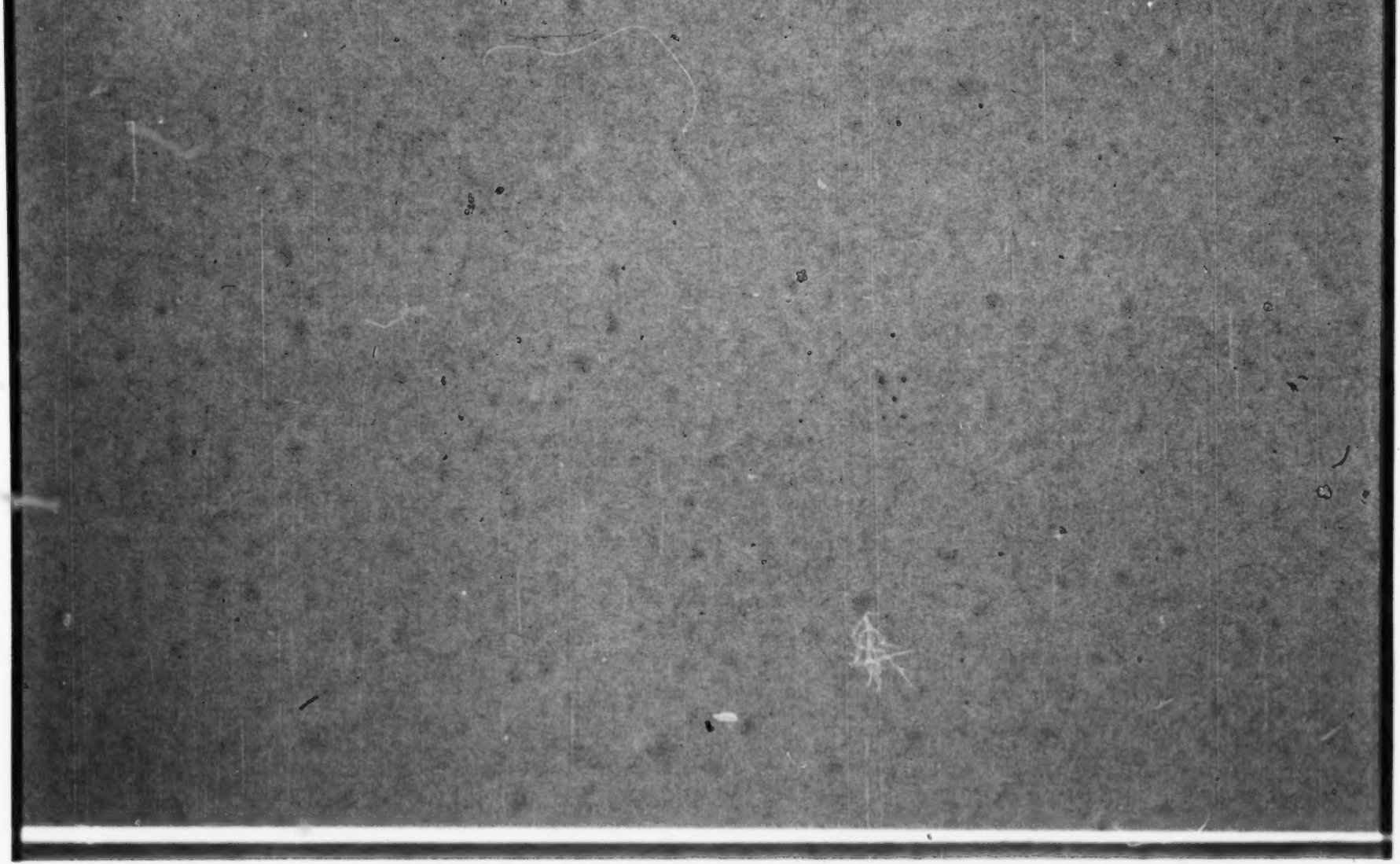

APPENDIX A.

Opinions of the Court of Appeals.

In the United States Court of Appeals, for the Ninth Circuit.

County of Santa Barbara, a political subdivision of the State of California; the City of Santa Barbara, a municipal corporation of the State of California; Alvin Weingand; Jack D. Kisch; Reynolds Yater; Jinnie Huglin; Norman Sanders; Margaret D. Greenwald; Arthur Dayton; Lewis Motter Smith; Mrs. George Sidenberg, Jr.; Mrs. Kenneth Peck; Robert O. Easton; Charles M. Campbell, Jr.; Kenneth Millar; William Ure; James Bottoms; Fred Eissler; Norman S. Nyce; Mrs. H. R. Benham, Jr., Appellants, v. Robert J. Malley, Los Angeles District Engineer, Corps of Engineers; Union Oil Company of California, a California corporation; Mobile Oil Corporation, a New York corporation; Phillips Petroleum Company, a Delaware corporation; Standard Oil Company of California, a California corporation; Humble Oil and Refining Company, a Delaware corporation; Texaco, Inc., a Delaware corporation; Atlantic-Richfield Company, a Pennsylvania Corporation; Gulf Oil Company, a Pennsylvania corporation; Pauley Petroleum, Inc., a Delaware corporation; Colorado Oil and Gas Corporation, a Delaware corporation; Mesa Petroleum Co., a Delaware corporation; McCulloch Oil Corporation of California, a Delaware corporation; J. M. Huber Corporation, a New Jersey corporation; Husky Oil Company of Delaware, a Delaware corporation; Sun Oil Company, a New Jersey corporation; Shell Oil Company, a Delaware corporation, Appellees. No. 25,049.

Filed: April 21, 1970.

Appeal from the United States District Court, for the Central District of California.

Before: HAMLEY and BROWNING, Circuit Judges, and SMITH, District Judge*

HAMLEY, Circuit Judge:

As in the related *Hickel* cases, Nos. 25413 and 25414, in which an opinion has been filed today, this case is an aftermath of the January, 1969 oilwell blowout under Union Oil Company's Platform A in the Santa Barbara Channel.

In the posture of the case as it reaches this court, the ultimate relief sought by plaintiffs is much more limited than that which they originally asked for in their complaint. They now seek a mandatory injunction pertaining only to the duties of Robert J. Malley, Los Angeles District Engineer, Corps of Engineers (District Engineer), in acting upon applications for permits to construct new facilities on the Outer Continental Shelf. As to these applications plaintiffs now seek a mandatory injunction requiring the District Engineer to grant them a public hearing before acting thereon. Such hearings would be limited, however, to the effect of the facilities upon navigation and national security.[1]

On October 3, 1969, when plaintiffs began this action, they moved for a preliminary injunction restraining the District Engineer from granting any such appli-

*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

[1]Plaintiffs are now content to have all considerations other than navigation and national security explored in proceedings before the Secretary of the Interior and his agents, a matter dealt with in the *Hickel* cases.

cation during the course of this ligitation without first according plaintiffs a hearing of the kind described above. Judging by statements made by them in their briefs on appeal, the irreparable damage plaintiffs claim they will sustain if a preliminary injunction is not granted is the loss of their right to hearings on any Outer-Continental-Shelf applications the District Engineer may grant during the pendency of the litigation.

The district court denied the motion for a preliminary injunction. It did so on the following grounds: (1) plaintiffs did not show a strong likelihood that they would ultimately prevail on the merits—*i.e.*, that they were entitled to public hearings under the applicable statutes and regulations, and the Constitution; (2) plaintiffs failed to show any substantial injury to any of their interests due to the denial of such hearings; and (3) the non-Government defendants demonstrated a great likelihood of substantial and immediate injury in the event preliminary injunctive relief was granted. Plaintiffs took this appeal from the order denying a preliminary injunction.

As we said in our opinion filed today in the *Hickel* cases, the granting or withholding of a preliminary injunction rests in the sound discretion of the district court, reviewable only for abuse of discretion. Plaintiffs agree that one of the criteria to be applied in passing upon an application for a preliminary injunctio is whether plaintiffs have shown a strong likelihood that they will ultimately prevail on the merits. But plaintiffs deny that they have failed in this regard. They argue that they have made the requisite showing because, under the established facts and law, they

are entitled as of right to an agency hearing before the District Engineer grants new applications for oil facilities on the Outer Continental Shelf in the Santa Barbara Channel.

We agree with the district court that plaintiffs did not show a strong likelihood that they would ultimately prevail on the merits of their right-to-a-hearing claim.

Plaintiffs do not asserrt that any statute contains express language granting them such a right. They argue, however, that the applicable regulations of the Corps of Engineers, Department of the Army, particularly 33 C.F.R. § 209.120(g), require the District Engineer to grant them a hearing before acting upon applications of the kind in question.

We need not decide whether those regulations, as they existed when the motion for a preliminary injunction was denied in December, 1969, entitled plaintiffs to a hearing. Since at this point plaintiffs seek hearings only as to applications not yet acted upon, the right thereto is now governed by revised regulations which became effective on January 3, 1970.

Section 209.120(g) relates specifically to public hearings. As paragraph (g) of section 209.120 existed in December, 1969, it consisted of subparagraphs (1) and (2), pertaining to public hearings in general. As amended effective January 3, 1970, 35 Fed.Reg. 79, 80 (1970), minor changes were made in subparagraphs (1) and (2), part of subparagraph (2) was renumbered (4) and a new subparagraph (3) was added. New subparagraph (3) deals expressly with hearings concerning navigation and national security in connection

with applications for permits authorizing structures on oil leases on the Outer Continental Shelf.[2]

In our opinion, subparagraph (3) of the revised regulation, quoted in the margin, states an exception to the general public hearing requirements set out in subparagraphs (1) and (2). Whatever the provisions of subparagraphs (1) and (2) may provide with regard to hearings in general, subparagraph (3) is controlling insofar as hearings pertaining to the Outer Continental Shelf are concerned. Under that subparagraph public hearings will not normally be held in connection with applications of the kind here in issue. They will be

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[2] 33 C.F.R. § 209.120(g)(1), (2) and (3), as revised in January, 1970, read:

"(g) *Public hearing.* (1) It is the policy of the Chief of Engineers to conduct his civil works program in an atmosphere of public understanding, trust, and mutual cooperation, and in a manner responsive to public needs and desires. To this end, public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action. In case of doubt, a public hearing should be held.

"(2) Among the instances warranting public hearings are general public opposition to issuance of a permit for work in navigable waters of the United States. District Engineers will notify the Division Engineers of the need for a hearing, state the proposed arrangements and obtain his concurrence. Public hearings will be held in connection with applications for permits in navigable waters of the United States when Congressional interests or responsible local authorities make an official and valid request therefor and such action will fulfill the above stated policy and objectives.

"(3) Since the Corps of Engineers considers only the effect on navigation and national security, public hearings will not normally be held in connection with applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior which has responsibility for other aspects of the public interest. Public hearings will be held by the Corps of Engineers only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security." 35 Fed.Reg. 79, 80 (1970).

held "only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security." 35 Fed.Reg. at 80.

We therefore conclude that plaintiffs are not likely to prevail on the merits in this lawsuit, insofar as they rely upon the administrative regulations as the basis for their asserted right to hearings.

As they did in the district court, plaintiffs also argue on this appeal that the Due Process Clause of the Fifth Amendment guarantees them a public hearing with regard to applications for future permits to construct facilities on mineral leases located on the Outer Continental Shelf.

Since such hearings would be concerned only with navigation and national security, would pertain to the use of lands controlled by the United States under lease to others,[3] and would not purport to adjudicate the property rights of any of the plaintiffs, we think there is little likelihood that plaintiffs can establish a constitutional right to them. If they mean to assert that the applicable statutes are unconstitutional because they do not expressly provide for hearings as a matter of right, they must, since they seek an injunction, take that question to a three-judge court convened under 28 U.S.C. §§ 2282 and 2284.

For the reasons stated above it is our opinion that the district court did not abuse its discretion in denying the motion for a preliminary injunction.

Affirmed.

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[3]*See Alabama v. Texas*, 347 U.S. 272, 273 (1954); *United States v. California*, 332 U.S. 19, 27 (1947); *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940).

In the United States Court of Appeals, for the Ninth Circuit.

County of Santa Barbara, a political subdivision of the State of California, and The City of Santa Barbara, a municipal corporation of the State of California, Appellants, v. Walter J. Hickel, Secretary of the Interior, United States of America; William T. Pecora, Director, United States Geological Survey; D. W. Solanas, Regional Supervisor, Oil and Gas Division, United States Geological Survey; Union Oil Company of California, a California corporation; Mobil Oil Corporation; a New York corporation; Phillips Petroleum Company, a Delaware corporation; Standard Oil Company of California, a California corporation; Humble Oil and Refining Company; a Delaware corporation; Texaco, Inc., a Delaware corporation; Atlantic-Richfield Company, a Pennsylvania corporation; Gulf Oil Company, a Pennsylvania corporation; Pauley Petroleum, Inc., a Delaware corporation; Colorado Oil and Gas Corporation, a Delaware corporation; Mesa Petroleum Co., a Delaware corporation; McCulloch Oil Corporation of California, a Delaware corporation; J. M. Huber Corporation, a New Jersey corporation; Husky Oil Company of Delaware, a Delaware corporation; Western Offshore Drilling and Exploration Co., a California corporation; and Peter Bawden Drilling, Inc., a Delaware corporation, Appellees. No. 25,413.

Alvin Weingand; Jack D. Kisch; Reynolds Yater; Jinnie Huglin; Norman Sanders; Margaret D. Greenwald; Arthur Dayton; Lewis Motter Smith; Mrs. George M. Sidenberg, Jr.; Mrs. Kenneth Peck; Robert O. Easton; Charles M. Campbell, Jr.; Kenneth Millar; William Ure; James Bottoms; Fred Eissler; Norman S.

Nyce; Mrs. H. R. Benham, Jr., Appellants, v. Walter J. Hickel, Secretary of the Interior; William T. Pecora, Director, United States Geological Survey; D. W. Solanas, Regional Supervisor, Oil and Gas Division, United States Geological Survey; Lee A. DuBridge, Science Advisor to the President of the United States; John S. Steinhart, Office of Science and Technology and Executive Secretary to the Special Panel on the Future of the Union Oil Lease; Gulf Oil Company; Mobil Oil Corporation; Texaco, Inc.; Union Oil Co., Appellees. No. 25,414.

Filed April 21, 1970.

Appeals from the United States District Court for the Central District of California.

Before: HAMLEY and BROWNING, Circuit Judges, and SMITH, District Judge*

HAMLEY, Circuit Judge:

These cases involve oil drilling and production operations in the Santa Barbara Channel. They are before us on appeals taken by the respective plaintiffs from orders, entered in both cases, denying motions for a preliminary injunction.

We consolidated the cases for briefing and argument with *County of Santa Barbara, et al. v. Malley, et al.*, No. 25,049, in which a separate opinion is being filed today. For convenience we will refer to the three as the *Santa Barbara, Weingand* and *Malley* cases. The two cases dealt with in this opinion (the *Santa Barbara* and *Weingand* cases) will sometimes be referred to collectively as the *Hickel* cases.

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*The Honorable Russell E. Smith, United States District Judge for the District of Montana, sitting by designation.

On April 1, 1968, following competitive bidding, the Secretary of the Interior (Secretary) awarded leases to the non-Government appellees authorizing them to explore for oil, and to construct and operate oil production facilities, on the Outer Continental Shelf in the Santa Barbara Channel. This was done pursuant to authority vested in the Secretary under the Outer Continental Shelf Lands Act (Act), 43 U.S.C. §§ 1331 et seq.

On January 28, 1969, there was an oil well blowout in the Santa Barbara Channel under Platform A, a facility constructed and operated by Union Oil Company under a lease awarded to it in the manner described. On February 7, 1969, the Secretary ordered cessation of all oil drilling and production operations in the Channel. Under direction of the President, the Secretary then appointed a panel of experts, popularly known as the DuBridge Panel, to make recommendations to reduce the then extant oil seepage and to minimize the possibility of future oil spills. On May 27, 1969, the panel issued its recommendations.[1]

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[1]In summary, the DuBridge Panel recommendations, made public on June 2, 1969, were to:

1. Contain and control present oil seepage through the use of underwater receptacles or other suitable methods.
2. Seal off, or reduce as much as possible, the flow from existing seeps through a program of shallow drilling (above the 'C' marker), pumping and grounding.
3. Review the possible earthquake hazards and take necessary actions.
4. Attempt, through an oil withdrawal program, to determine the degree of interconnection between levels of the Repetto formation.
5. Reduce pressures throughout the reservoir to hydrostatic or less and maintain pressures with water injection, if needed, to minimize subsidence.
6. Deplete all Repetto reservoirs as efficiently and rapidly as possible, consistent with safe practices.

In the meantime, on April 4, 1969, plaintiffs in the *Santa Barbara* case filed that action, and on June 4, 1969, they filed an amended complaint. Two claims were asserted. In their first claim plaintiffs alleged that in connection with the awarding of leases, the Secretary had exceeded his statutory authority; and that in the construction and operation of facilities thereunder, some or all of the defendants had been negligent and had engaged in extra-hazardous activities without taking precautions required by such activities. In their second claim plaintiffs asserted that "said Act and the application thereof is [sic] repugnant to the Constitution of the United States . . .," and they requested that the matter be heard before a three-judge court under 28 U.S.C. § 2282.[2]

Accordingly, plaintiffs in the *Santa Barbara* case sought a mandatory injunction which would permanently stop any further offshore drilling operations adjacent to the State of California. They also sought a judicial declaration that the Act is unconstitutional.

Plaintiffs in the *Weingand* case commenced that action on July 10, 1969, and filed an amended complaint on August 11, 1969. Two claims were asserted.

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[2]Plaintiffs alleged that the Act, on its face or as applied, is unconstitutional under the Fifth Amendment because: (1) the Act provides for an unconstitutional delegation of legislative powers to the executive branch of government; (2) the powers granted the Secretary—under the Act—are unlimited, over-broad, vague and without standards with respect to such matters as the commencement, continuance or termination of drilling; and (3) the Act makes no provision for hearing procedures nor for the right of redress or compensation to persons adversely affected or deprived of private property upon the application and enforcement of the Act. Plaintiffs also alleged that the Act violated their "fundamental right to retain and enjoy the esthetic beauty of natural resources reasonably free of obstruction and pollution . . .," as guaranteed by the Ninth Amendment.

In their first claim, plaintiffs alleged that the Government defendants: (1) had refused to make available to plaintiffs and others the data upon which the recommendations of the DuBridge Panel were based; and (2) had refused to accord plaintiffs a hearing on whether the DuBridge recommendations should be effectuated. In their second claim, plaintiffs challenged the constitutionality of the Act upon essentially the same grounds relied upon by the plaintiffs in *Santa Barbara*.

Plaintiffs in the *Weingand* case sought: (1) the convening of a three-judge court under 28 U.S.C. §§2282 and 2284 to hear and determine the proceedings; (2) a preliminary, and a permanent, injunction restraining the Secretary from approving the DuBridge report and from effectuating the DuBridge recommendations without first granting plaintiffs and others a public hearing and without giving plaintiffs and others prior access to the DuBridge data; and (3) a preliminary and a permanent injunction restraining the Secretary from the enforcement, operation and execution of the Act on the ground of its repugnance to the Constitution of the United States.

A three-judge court was constituted to hear both the *Santa Barbara* and *Weingand* cases. In both cases plaintiffs moved for summary judgment on the claims challenging the constitutionality of the Act. In both, defendants moved to dismiss the action. The Honorable Albert Lee Stephens, Jr., one of the members of the three-judge court, with the concurrence of all three judges of that court, entered an order providing that only those motions which raise a constitutional question would be heard by the three-judge court, and providing that all other motions not raising a constitutional issue

would be heard by Judge Stephens.[3] In the same order the motions for summary judgment were assigned to the three-judge court for disposition.

The three-judge court heard arguments on the motions for summary judgment on September 23, 1969. On February 10, 1970, the three-judge court, in an unreported order, denied the motions for summary judgment, holding that the Act and regulations "are not repugnant to the Constitution of the United States."

On October 3, 1969, the plaintiffs in the *Malley* case commenced their action. On the same day plaintiffs in all three cases filed a joint motion for a preliminary injunction. The nature of the preliminary injunction sought in the *Malley* case is described in our opinion in that appeal. In the *Hickel* cases, plaintiffs seek to restrain the Government defendants, pending disposition of the litigation, from allowing the drilling of any new wells in the Santa Barbara Channel without first: (1) holding a public hearing and (2) making available to plaintiffs and to the public, a reasonable time in advance of the hearing, the data upon which such defendants have acted or intend to act with regard to the Santa Barbara Channel oil spill.[4]

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[3]Since the parties do not, on these appeals, question this procedure, we express no opinion as to whether the two suits should have been bifurcated in this manner. Later in this opinion, however, we will have something to say concerning the disposition of the motions for a preliminary injunction by a single district judge rather than by the full three-judge court.

[4]By this time the DuBridge recommendations were in the process of implementation. See note 1 above. After such recommendations had been made, the Secretary authorized defendant Union Oil Company to effectuate the recommended priorities. Union began doing so immediately by, among other things, drilling new oil wells.

The district court denied the motion for a preliminary injunction in the *Hickel* cases on February 10, 1970. In so ruling, that court held that: (1) there is no requirement of a hearing under the Constitution or laws of the United States, or applicable rules or regulations, for persons in plaintiffs' position; (2) there is no requirement under the Constitution, laws, or regulations that information such as that which plaintiffs seek be make available to them; and (3) plaintiffs have not shown sufficient need for the extraordinary relief which would be afforded by a preliminary injunction and have failed to show an irreparable injury.[5] These appeals followed.

The granting or withholding of a preliminary injunction rests in the souund discretion of the trial court. *Jones v. Board of Regents,* 397 F.2d 259 (9th Cir. 1968). Our function on these appeals is therefore to determine whether, in denying a preliminary injunction, the district court abused its discretion.

A showing that the plaintiffs will otherwise suffer irreparable injury is an essential prerequisite to a preliminary injunction. *Kontes Glass Company v. Lab Glass, Inc.,* 373 F.2d 319, 320 (3rd Cir. 1967). Clearly, plaintiffs have not shown that, unless a preliminary injunction is issued granting them a hearing before the Government defendants allow the drilling of new

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[5]The district court also thought that the circumstances were such that the court should not restrict the Secretary's freedom of action in dealing with the urgent problem of oil spillage, finding:

> "The Secretary of the Interior may have necessity for making decisions in sequence upon the matter which is the subject of the above entitled action, which would be hampered by preliminary injunctive relief.
>
> "A preliminary injunction granted herein, as requested by plaintiffs, might very well inhibit the decision making which would be necessary for the protection of the public and for prevention of another such incident."

wells in the Santa Barbara Channel, there will be another blowout or other physical damage of an irreparable nature. But they argue that they have a right to an agency hearing before additional oil drilling is allowed, and if they are not granted such a hearing pending disposition of the litigation, the right to such hearing will, as to any well drilled in the meantime, be lost forever. This is the irreparable damage which, plaintiffs assert, should have been, but was not, recognized by the district court.

Thus, while the merits of the litigation are not ordinarily to be decided in passing upon a motion for a preliminary injunction, plaintiffs have here so related their irreparable damage contention to their asserted right to a hearing that a consideration of the merits cannot be avoided.

We turn, then, to plaintiffs' claimed right to an agency hearing before the non-Government defendants are allowed to drill new wells on the Outer Continental Shelf. Plaintiffs do not contend that the Act contains any express language requiring the Secretary of the Interior or any of his representatives to afford plaintiffs a hearing or to make available the desired data. They contend, instead, that they are entitled to such a hearing, and to the data, because the applicable regulations provide for such a hearing, and because the failure to grant a hearing would deprive plaintiffs of due process of law.[6]

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[6]Plaintiffs also claim that they are entitled to a hearing as a matter of equal protection of the law under the Act and the regulations promulgated by the Secretary. According to their reasoning, the Act and the regulations "provide ample due process to the oil company lessees but not the plaintiff or the public. . . ." because they provide lessees with repeated opportunities for hearings on matters affecting the lessees' interests but make

The regulations of the Secretary pertaining to oil and gas operations in the Outer Continental Shelf appear in 30 C.F.R. §§ 250.1 et seq. (Part 250) and 43 C.F.R. §§ 3380.0 et seq. (Part 3380).

Plaintiffs rely upon several sections of Part 250, as noted in the margin.[7] These regulations were amended in August, 1969. 34 Fed.Reg. 13544 (1969). We will distinguish between the revised and the superseded regulations by use of the term "new" and "old."

Both the old and the new regulations contained in Part 250 spell out in considerable detail the factors which the Secretary and his agents are to bear in mind in performing their duties under the Act. These factors include the protection and conservation of natural resources, maximum economic recovery of mineral resources compatible with sound conservation practices, protection of wildlife and aquatic life, protection of human health, safety, property, and the environment, abatement of damage or waste, and avoidance of pollution of the waters of the high seas. *E.g.*, 30 C.F.R. §§ 250.1 (old and new), 250.11 (old and new), and 250.12 (old and new).

The only provision of the old Part 250 regulations which made any mention of a hearing was section 250.11. This section provided that, "After appropriate hearings," the supervisor (a representative of the Secretary) may establish field rules to govern the development and method of production of a pool, field, or area.

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no similar provision for the plaintiffs or for the general public. However, since plaintiffs challenge the actions of a federal official in this suit, this line of argument, although labelled an equal protection attack, amounts to a claim of deprivation of due process *Cf. Bolling v. Sharpe*, 347 U.S. 497 (1954).

[7] 30 C.F.R. §§250.1, .11, .12, .16, .17, .30, .36, .42, .43, .46, .81, and .82.

Old section 250.11 did not provide for the kind of hearing plaintiffs seek, for they have not asked to be heard with reference to the establishment of "field rules." Furthermore, new section 250.11, as revised in August, 1969, which controls this suit (*Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969)), eliminates even that provision for a hearing. In its place, new section 250.11 provides that, prior to the issuance of orders and rules, the supervisor "may consult with, and receive comments from, lessees, operators, and other interested parties." 34 Fed.Reg. 13544 (1969). Granting that plaintiffs are "interested parties" in the context of these cases, their right under new section 250.11 to make known their views does not now expressly encompass hearings.[8] There is no other provision of the Part 250 regulations which provides for hearings.

With regard to Part 3380, plaintiffs primarily rely upon section 3381.4, as recently revised. 34 Fed.Reg. 13549 (1969). This section pertains to the selection of tracts for leasing on the Outer Continental Shelf. It provides that, prior to the selection of tracts for leasing, the Director (a representative of the Secretary) shall evaluate fully the potential effect of the leasing program "on the total environment, aquatic resources, aesthetics, recreation, and other resources in the entire area during exploration, development and opera-

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[8]This is not to say that the supervisor, or a higher official in the hierarchy of the Department of the Interior, may not call for a hearing, or that such a hearing ought not to be granted under circumstances of the kind involved in this litigation. Absent emergency considerations such as suggested in the findings of fact of the district court, it would appear to be a salutary practice for the appropriate officials to adopt a liberal attitude towards the granting of hearings in matters of such public importance as are involved in this case.

tional phases." *Id.* The section further provides that, to aid him in his evaluation and determinations, the Director "shall request and consider" the views and recommendations of appropriate federal agencies, and "may hold public hearings after appropriate notice, and may consult with State agencies, organizations, industries and individuals." *Id.*

It will be noted that this regulation pertains to the selection of tracts for leasing, and not to the allowing of drilling of new wells at particular locations, which is the limited sphere of activity plaintiffs seek to affect by their motion for a preliminary injunction. Moreover, the provision of new section 3381.4 with regard to hearings does not speak in mandatory terms but merely authorizes the Director to hold public hearings if he wishes to do so.

This leaves for discussion plaintiffs' argument that the failure to grant them a hearing and prior access to the described data deprives them of due process of law. The Act does not expressly grant the right of public hearings, as plaintiffs concede. They are arguing, in effect, that the constitutionality of the Act can only be saved by reading into the statute the requirement that hearings be held.

But all aspects of this contitutional question have heretofore been assigned to the three-judge court in the *Santa Barbara* case and we are therefore without jurisdiction to consider that issue. In their second claim in the *Santa Barbara* case, which was assigned to the three-judge court, plaintiffs alleged that the Act or "the application thereof" is repugnant to the Constitution. One reason stated in this claim why the Act is uncon-

stitutional is that "the Act and the actions of the Secretary of the Interior make no provision for hearing procedures. . . ." For this reason, and others, plaintiffs sought a mandatory injunction permanently restraining defendants from any activities involving offshore oil drilling operations of any nature adjacent to the shore of the State of California.

In their second claim in the *Weingand* case, plaintiffs purport to limit their grievance to the asserted unconstitutionality of the Act "on its face." If plaintiffs thereby intended to deprive the three-judge court of jurisdiction to determine whether the Act, as applied, is unconstitutional, we question whether they may do so. Title 28, section 2282, provides that when an injunction is sought to restrain the "enforcement, operation or execution of any Act of Congress for repugnance to the Constitution," the application is to be heard and determined by a district court of three judges. The quoted language does not seem to be limited to questions concerning the constitutionality of a federal statute "on its face."

Moreover there would be an obvious waste of judicial resources, and an unnecessary confusion of issues, if plaintiffs were permitted to pursue part of their constitutional attack in the three-judge court, with appeal to the Supreme Court, and part in the single district court, with appeal to this court. Finally, however successful plaintiffs may have been in bifurcating the constitutional issue in the *Weingand* case, they have, as noted above, submitted the whole constitutional problem to the three-judge court in the *Santa Barbara* case.

Inasmuch as the motions for a preliminary injunction in the *Hickel* cases raised constitutional questions, it is doubtful whether the single district judge, as distinguished from the three-judge court, should have dealt with any phase of those motions. See 28 U.S.C. § 2284(3)-(5). But since the single district judge determined to deal with them, and this course has not been questioned by any of the parties, his subject-matter jurisdiction was at least limited to non-Constitutional issues.

Since, as to all aspects of the *Hickel* cases which are properly before this court, plaintiffs have failed to establish a right to an agency hearing before additional oil drilling on the Outer Continental Shelf is allowed, the failure to grant such a hearing does not amount to an irreparable damage which could be avoided by granting the requested preliminary injunction. Accordingly, the district court did not abuse its discretion in denying, on the non-Constitutional grounds, the motion for a preliminary injunction.

Affirmed.

APPENDIX B.

Fifth Amendment to the United States Constitution.

"No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

APPENDIX C.

33 Code of Federal Regulations § 209.120(g)(1), (2) and (3).

"(g) *Public hearing.* (1) It is the policy of the Chief of Engineers to conduct his civil works program in an atmosphere of public understanding, trust, and mutual cooperation, and in a manner responsive to public needs and desires. To this end, public hearings are helpful and will be held whenever there appears to be sufficient public interest to justify such action. In case of doubt, a public hearing should be held.

"(2) Among the instances warranting public hearings are general public opposition to issuance of a permit for work in navigable waters of the United States. District Engineers will notify the Division Engineers of the need for a hearing, state the proposed arrangements and obtain his concurrence. Public hearings will be held in connection with applications for permits in navigable waters of the United States when Congressional interests or responsible local authorities make an official and valid request therefor and such action will fulfill the above stated policy and objectives.

"(3) Since the Corps of Engineers considers only the effect on navigation and national security, public hearings will not normally be held in connection with applications for permits for artificial islands or fixed structures on Outer Continental Shelf lands under mineral lease from the Department of the Interior which has responsibility for other aspects of the public interest. Public hearings will be held by the Corps of Engineers only when in the District Engineer's judgment opponents have a reasonable complaint based on interference with navigation or on adverse effects on national security." 35 Fed.Reg. 79, 80 (1970).

APPENDIX D.

Pertinent Portions of the Outer Continental Shelf Lands Act (67 Stat. 462; 43 U.S.C. 1331 et seq.).

§1332. Congressional declaration of policy; jurisdiction; construction

(a) It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter.

(b) This subchapter shall be construed in such manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing therein shall not be affected.

§1333. Laws and regulations governing lands—Constitution and United States laws; laws of adjacent States; publication of projected States lines; restriction on State taxation and jurisdiction

(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

Jurisdiction of United States District Courts

(b) The United States district courts shall have original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or involving rights to the natural resources of the subsoil and seabed of the outer Continental Shelf, and proceedings with respect to any such

case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the adjacent State nearest the place where the cause of action arose.

Prevention of Obstruction to Navigation by Secretary of the Army

(f) The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to artificial islands and fixed structures located on the outer Continental Shelf.

Provisions as Non-Exclusive

(g) The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands and fixed structures referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

§1334. Administration of leasing—Rules and regulations; amendment; cooperation with State agencies; violations and penalties; compliance with regulations as condition of lease

(a)(1) The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and foregoing provisions of this section, the ruless and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural

resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of conservation laws, rules, and regulations the Secretary is authorized to cooperate with the conservation agencies of the adjacent States. Without limiting the generality of the regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases, for the sale of royalty oil and gas accruing or reserved to the United States at not less than market value, and, in the interest of conservation, for unitization, pooling, drilling agreements, suspension of operations or production, reduction of rentals or royalties, compensatory royalty agreements, subsurface storage of oil or gas in any of said submerged lands, and drilling or other easements necessary for operations or production.

(2) Any person who knowingly and willfully violates any rule or regulation prescribed by the Secretary for the prevention of waste, the conservation of the natural resources, or the protection of correlative rights shall be deemed guilty of a misdemeanor and punishable by a fine be deemed guilty of a misdemeanor and punishable by a fine of not more than $2,000 or by imprisonment for not more than six months, or by both such fine and imprisonment, and each day of violation shall be deemed to be a separate offense. The issuance and continuance in effect of any lease, or of any extension, renewal, or replacement of any lease under the provisions of this subchapter shall be conditioned upon compliance with the regulations issued

under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or with the regulations issued under the provisions of section 1335(b)(2) of this title if the lease is maintained under the provisions of section 1335 of this title.

Cancellation of Lease; Judicial Review

(b)(1) Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in section 1337(j) of this title, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(2) Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter and in force and effect on the date of the issuance of the lease if the lease is issued under the provisions of section 1337 of this title, or of the regulations issued under the provisions of section 1335(b)(2) of this title, if the lease is maintained under the provisions of section 1335 of this title, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

Pipeline Rights-of-Way; Forfeiture of Grant

(c) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other mineral under such regulations and upon such conditions as to the application therefor and the survey, location and width thereof as may be prescribed by the Secretary, and upon the express condition that such oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from said submerged lands in the vicinity of the pipeline in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed thereunder shall be ground for forfeiture of the grant in an appropriate judicial proceeding instituted by the United States in any United States district court having jurisdiction under the provisions of section 1333(b) of this title.

§ 1337. Grant of leases by Secretary—Oil and gas leases; award to highest bidder; method of bidding

(a) In order to meet the urgent need for further exploration and development of the oil and gas deposits

of the submerged lands of the outer Continental Shelf, the Secretary is authorized to grant to the highest responsible qualified bidder by competitive bidding under regulations promulgated in advance, oil and gas leases on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of section 1335(a) of this title. The bidding shall be (1) by sealed bids, and (2) at the discretion of the Secretary, on the basis of a cash bonus with a royalty fixed by the Secretary at not less than 12½ per centum in amount or value of the production saved, removed or sold, or on the basis of royalty, but at not less than the per centum above mentioned, with a cash bonus fixed by the Secretary.

Judicial review of cancellation of lease; petition within sixty days

(j) Any person complaining of a cancellation of a lease by the Secretary may have the Secretary's action reviewed in the United States District Court for the District of Columbia by filing a petition for review within sixty days after the Secretary takes such action.

§ 1341. Reservation of lands and rights—Withdrawal of unleased lands by President

(a) The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.

First refusal of mineral purchases

(b) In time of war, or when the President shall so prescribe, the United States shall have the right of first refusal to purchase at the market price all or any portion of any mineral produced from the outer Continental Shelf.

National security clause

(c) All leases issued under this subchapter, and leases, the maintenance and operation of which are authorized under this subchapter, shall contain or be construed to contain a provision whereby authority is vested in the Secretary, upon a recommendation of the Secretary of Defense, during a state of war or national emergency declared by the Congress or the President of the United States after August 7, 1953, to suspend operations under any lease; and all such leases shall contain or be construed to contain provisions for the payment of just compensation to the lessee whose operations are thus suspended.

National defense areas; suspension of operations; extension of leases

(d) The United States reserves and retains the right to designate by and through the Secretary of Defense, with the approval of the President, as areas restricted from exploration and operation that part of the outer Continental Shelf needed for national defense; and so long as such designation remains in effect no exploration or operations may be conducted on any part of the surface of such area except with the concurrence of the Secretary of Defense; and if operations or production under any lease theretofore issued on lands within any such restricted area shall be suspended, any payment of rentals, minimum royalty, and royalty prescribed by such lease likewise shall be suspended during such period of suspension of operation and production, and the term of such lease shall be extended by adding thereto any such suspension period, and the United States shall be liable to the lessee for such compensation as is required to be paid under the Constitution of the United States.

APPENDIX E.

Pertinent Portions of 30 C.F.R. Part 250.

§ 250.1 Purpose and authority.

The Outer Continental Shelf Lands Act enacted on August 7, 1953 (67 Stat. 462), referred to in this part as "the act," authorizes the Secretary of the Interior at any time to prescribe and amend such rules and regulations, to be applicable to all operations conducted under a lease issued or maintained under the provisions of the act, as he determines to be necessary and proper to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein. Subject to the supervisory authority of the Secretary of the Interior, the regulations in this part shall be administered by the Director of the Geological Survey through the Chief, Conservation Division.

§ 250.10 Jurisdiction.

Subject to the supervisory authority of the Secretary and the Director, drilling and production operations, handling and measurement of production, determination and collection of rental and royalty, and, in general, all operations conducted on a lease by or on behalf of a lessee are subject to the regulations in this part, and are under the jurisdiction of the superior for any region as delineated by the Director.

§ 250.11 General functions.

The supervisor is authorized and directed to act upon the requests, applications, and notice submitted under the regulations in this part and to require compliance with applicable laws, the lease terms, applicable regulations, and OCS Orders to the end that all opera-

tions shall be conducted in a manner which will protect the natural resources of the Outer Continental Shelf and result in the maximum economic recovery of the mineral resources in a manner compatible with sound conservation practices. Subject to the approval of the Chief, Conservation Division, Geological Survey, the supervisor may issue OCS Orders implementing the requirements of the regulations of this part when such implementations apply to an entire region or a major portion thereof. The supervisor may issue written or oral orders to govern lease operations. Oral orders shall be confirmed in writing by the supervisor as promptly as possible. The supervisor may issue other orders, and rules to govern the development and method of production of a pool, field, or area. Prior to the issuance of OCS Orders and other orders and rules, the supervisor may consult with, and receive comments from, lessees, operators, and other interested parties. Before permitting operations on the leased land, the supervisor may require evidence that a lease is in good standing, that the lessee is authorized to conduct operations, and that an acceptable bond has been filed.

§ 250.12 Regulation of operations.

(a) *Duties of supervisor.* The supervisor in accordance with the regulations in this part shall inspect and regulate all operations and is authorized to issue OCS Orders and other orders and rules necessary for him to effectively supervise operations and to prevent damage to, or waste of, any natural resource, or injury

to life or property. The supervisor shall receive, and shall, when in his judgment it is necessary, consult with or solicit advice from lessees, field officials of interested Departments and agencies, including the Fish and Wildlife Service, Federal Water Pollution Control Administration, Bureau of Land Management, Coast Guard, Department of Defense, Corps of Engineers, and representatives of State and local governments.

(c) Emergency suspensions. The supervisor is authorized, either in writing or orally with written confirmation, to suspend any operation, including production, which in his judgment threatens immediate, serious, or irreparable harm or damage to life, including aquatic life, to property, to the leased deposits, to other valuable mineral deposits or to the environment. Such emergency suspension shall continue until in his judgment the threat or danger has terminated.

§ 250.81 Appeals.

(a) An appeal from any order issued under authority of the regulations in this part may be filed as set forth in this section. Compliance with any such order shall not be suspended by reason of an appeal having been taken unless such suspension is authorized in writing by the Director or the Secretary (dependent upon the officer with whom the appeal is pending) and then only upon a determination that such suspension will not be detrimental to the lessor or upon the submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

(b) An appeal to the Director may be taken from any order of the supervisor by filing such appeal with the latter officer within 20 days after service of the order. The appeal shall incorporate or be accompanied by such written showing and argument on the facts and law as the appellant may deem adequate to justify reversal or modification of the order. All statements of fact must be made under oath.

(c) The supervisor shall transmit the appeal and accompanying papers to the Director with a full report and recommendations in the premises, and that official shall review the record and render such a decision in the case as he deems proper.

(d) An appeal from any decision of the Director may be taken to the Secretary within 30 days after service of the Director's Decision. The appeal shall be accompanied by such written showing and argument on the facts and law as appellant may deem adequate to justify reversal or modification of the decision. Any statements of fact not submitted to the Director must be made under oath.

(e) Oral argument in any case pending before the supervisor, the Director, or the Secretary will be allowed on motion in the discretion of such officer and at a time to be fixed by him.

§ 250.82 Judicial review.

Nothing contained in this part shall be construed to prevent any interested party from seeking judicial review as authorized by law.

§ 250.91 Application for permit to drill, deepen, or plug back.

Applications for permits to drill, deepen, or plug back must be filed in triplicate on Form 9-331C. Prior to commencing such operations approval in writing must be received from the supervisor.

§ 250.97 Public inspection of records.

Geological and geophysical interpretations, maps, and data required to be submitted under this part shall not be available for public inspection without the consent of the lessee so long as the lease remains in effect or until such time as the supervisor determines that release of such information is required and necessary for the proper development of the field or area.

APPENDIX F.

Pertinent Portions of 43 C.F.R. Subpart 3380.

§ 3380.0-3 Purpose and authority.

The Outer Continental Shelf Lands Act of August 7, 1953 (67 Stat. 462; 43 U.S.C. § 1331 et seq.), referred to in this part as "the act", among other things, authorizes the Secretary of the Interior to issue on a competitive basis leases for oil and gas, sulphur, and other minerals in submerged lands of the Outer Continental Shelf, as defined in section 2 of the act. Subject to the supervisory authority of the Secretary, the regulations in this part shall be administered by the Director, Bureau of Land Management, hereinafter referred to in this part as the Director.

§ 3380.0-4 Applicability of public land laws.

The laws and regulations pertaining to the public lands of the United States are not applicable to the submerged lands of the Outer Continental Shelf. Mineral deposits in the submerged lands of the Outer Continental Shelf are subject to disposition only in accordance with the provisions of the act and the regulations promulgated by the Secretary thereunder.

§ 3381.4 Selection of tracts.

The Director, prior to the final selection of tracts for leasing, either selected in his own motion or nominated pursuant to § 3381.3 of this subpart, shall evaluate fully the potential effect of the leasing program on the total environment, aquatic resources, aesthetics, recreation, and other resources in the entire area during exploration, development and operational phases.

To aid him in his evaluation and determinations he shall request and consider the views and recommendations of appropriate Federal agencies, may hold public hearings after appropriate notice, and may consult with state agencies, organizations, industries, and individuals. The Director shall develop special leasing stipulations and conditions when necessary to protect the environment and all other resources, and such special stipulations and conditions shall be contained in the proposed notice of lease offer. The proposed notice of lease offer, together with all views and recommendations received and the Director's findings or actions thereon, shall be submitted to the Secretary for final approval.